Employment Act of 1967, as amended (AADEA≅), 29 U.S.C. ээ 621 et seq., it would have had to do so explicitly. In the face of Aambiguity, [the Court] will not attribute to Congress an intent to intrude on state governmental functions.≅ Ashcroft, 501 U.S. at 470. Although it was certainly arguable that state judges were within the scope of ADEA=s protections X indeed, the Court acknowledged that excluding Aappointee[s] on the policymaking level≅ would have been Aan odd way for Congress to exclude judges≅ X the Court was Anot looking for a plain statement that judges are excluded.≅ Id. at 467 (internal quotation marks omitted; emphasis added). Rather, the Court required a plain statement that judges were included, for such a rule Ais nothing more than an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere.≅ Id. at 461. This requires the Court to apply a presumption that Congress does not intend to override traditional exercises of state sovereignty unless it is Aplain to anyone reading the Act≅ that it is to have such an effect. Id. at 467. Because it was Aat least ambiguous whether a state judge is an >appointee on the policymaking level,=≅ id., the Court declined to preempt Missouri law.

This plain statement requirement is not easily satisfied. The Supreme Court recently applied Ashcroft when considering whether the Americans with Disabilities Act of 1990 (AADA≅), 42 U.S.C. ээ 12131 et seq., covers inmates in state prisons. Pennsylvania Dep=t of Corrections v. Yeskey, 118 S. Ct. 1952 (1998). The ADA prohibits a Apublic entity≅ from denying to a qualified individual by reason of a disability the benefits of the services, programs, or activities provided by that public entity. 42 U.S.C. э 12132. The Court assumed without

deciding Athat the plain-statement rule does govern application of the ADA to the administration of state prisons.≅ 118 S. Ct. at 1954. But the Court had no trouble concluding that the plain statement requirement was satisfied in this particular case for the simple reason that A[s]tate prisons fall squarely within the statutory definition of >public entity,= which includes >any department, agency, special purpose district, or other instrumentality of a State or States or local government.=≅ Id. at 1954-55 (quoting 42 U.S.C. ∋ 12131(1)(B)).

In marked contrast (and as petitioners concede), the Communications Act contains no definition of the term Aentity.≅ See Pet. 28. Whereas the Court in Yeskey could conclude that Athe plain text . . . of the ADA unambiguously extends to state prison inmates,≅ 118 S. Ct. at 1956, it is simply not possible to conclude that section 253 Aunambiguously extends≅ to Missouri=s own municipalities.

Similarly, the Ninth Circuit has found a plain statement in the Fair Labor Standards Act of 1938 (AFLSA≅), 29 U.S.C. ∋∋ 201 et seq., that satisfies the Ashcroft standard and that underscores once again how far from plain is the language of section 253. In Biggs v. Wilson, 1 F.3d 1537 (9th Cir. 1993), the court considered whether California had violated the FLSA=s minimum wage provisions by paying certain state employees two weeks late. The FLSA provides that A[e]very employer shall pay to each of his employees . . . who in any workweek is engaged in commerce or in the production of goods for commerce . . . not less than the minimum wage.≅ 29 U.S.C. ∋ 206(b). State officials had argued that applying FLSA=s requirements to highway maintenance workers employed by the California Department of Transportation would

interfere with the state budgetary process and lead to a Aserious infringement of state sovereignty.≅ 1 F.3d at 1543.

The Ninth Circuit rejected California=s argument, concluding that the Aplain statement rule is satisfied here since the FLSA clearly applies to state employees such as [plaintiff].≅ Id. at 1544. And the reason that the FLSA Aclearly applies to state employees≅ is found in the definitional section of the statute: the term Aemployee≅ is defined explicitly to include Aan individual employed by a public agency,≅ see 29 U.S.C. ∋ 203(e)(2), which in turn is defined to include Aa State, political subdivision of a State, or an interstate governmental agency,≅ id. ∋ 203(e)(2)(C). The absence of anything similar in the Communications Act that would make it Aunmistakably clear in the language of the statute≅ (Ashcroft, 501 U.S. at 460) that Congress intended to have section 253 apply to public entities is dispositive of petitioners= claim.

In a different context, the D.C. Circuit has required substantially more than what is contained in section 253 to satisfy the plain statement rule. In Virginia v. EPA, 108 F.3d 1397, modified on other grounds, 116 F.3d 499 (D.C. Cir. 1997), the question was whether the Clean Air Act (ACAA≅), 42 U.S.C. ∋∋ 7401 et seq., authorized the EPA to require all of the northeastern States to reduce the emissions from new cars to the ALow Emission Vehicle≅ standards established in California. Section 110 provides that the EPA may require a State to revise its national ambient air quality standards Aas necessary≅ to correct any inadequacies identified by the Administrator, 42 U.S.C. ∋ 7410(k)(5), but it nowhere provides that the EPA

may Arequire states to insert in their plans control measures EPA has selected.≅ Virginia, 108 F.3d at 1409.

The D.C. Circuit invoked the Seventh Circuit=s description of the CAA as A>an experiment in federalism=≅ in which A>the EPA may not run roughshod over the procedural prerogatives that the Act has reserved to the states. . . . especially when, as in this case, the agency is overriding state policy.=≅ Id. at 1408 (quoting Bethlehem Steel Corp. v. Gorsuch, 742 F.2d 1028, 1036-37 (7th Cir. 1984)). According to the court, the EPA=s attempt to require States to include particular control measures constituted an interference with state sovereignty sufficient to justify the application of the Ashcroft standard:

> Congress did not give EPA authority to choose the control measures or mix of measures states would put in their implementation plans. And we can think of no reason why Congress, merely by inserting the words Aas necessary,≅ would have meant to hand over that authority to EPA when it calls upon states to revise their implementation plans. We would have to see much clearer language to believe a statute allowed a federal agency to intrude so deeply into state political processes.

Id. at 1410 (footnote omitted) (citing Ashcroft, 501 U.S. at 463).

As Virginia v. EPA suggests, the D.C. Circuit requires Amuch clearer language≅ than that provided in section 253 before it will believe that Congress allowed the Commission Ato intrude so deeply into state political processes≅ as to order Missouri to permit its own political subdivisions to compete with private telecommunications providers. Id. Like the Aas necessary≅ language in section 110 of the CAA, the words Aany entity≅ in section 253 do not

provide the Commission with an unambiguous authorization to interfere with exercises of sovereign state authority as reflected in HB 620.

In sum, courts have applied Ashcroft in a variety of substantive legal contexts; when they have found the plain statement rule to be satisfied, they have invariably identified clear and unambiguous statutory texts that made Congress=s intent unmistakable. But where any ambiguity exists X such as whether the EPA=s authority to require revisions in state plans Aas necessary≅ includes the authority to require particular control measures or, as here, whether Aany entity≅ includes political subdivisions of a State X the plain statement rule is not satisfied. Under such circumstances, courts will not presume that Congress intended to Aupset the usual constitutional balance of federal and state powers.≅ Ashcroft, 501 U.S. at 460.

## CONCLUSION

For the foregoing reasons, the Commission should deny the petition for preemption.

Respectfully submitted,

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August 13, 1998

# EXHIBIT A

**PROPOSED ORDINANCE**
**TELECOMMUNICATIONS FRANCHISE REGULATORY CODE**
CITY OF ST. PETERS, MISSOURI

Prepared by:

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July 11, 1995

under this Chapter or a Franchise Agreement, whether arising before or after the date of the Franchise Transfer.

(g) *Filing Fees and Deposits.*

To be acceptable for filing, an application under this Section 25.8-4 submitted after the effective date of this Chapter shall be accompanied by a filing fee in the following amounts to cover the City's internal costs:

(1) For an initial Franchise or Franchise renewal: $1,000.00

(2) For modification of a Franchise Agreement $500.00

(3) For approval of a Franchise Transfer $500.00

In addition, the Board of Aldermen may require the applicant, or, where applicable, a transferee, to reimburse the City for its reasonable out-of-pocket expenses in considering an application, including consultants' fees and election expense.

*(h) Intergovernmental Cooperation.*

At the election of the Board of Aldermen any part or all of the process established by this Section 25.8-4 may be conducted in concert with other political subdivisions served or to be served by the applicant, under such procedures as the Board of Aldermen may establish.

Sec. 25.8-5. Construction Provisions:

(a) *Construction Procedures.*

(1) A Franchisee shall construct, operate and maintain Telecommunications Transmission and Distribution Facilities subject to the supervision of all of the authorities of the City who have jurisdiction in such matters, and in strict compliance with all applicable laws, ordinances, departmental rules and regulations.

(2) Telecommunications Transmission and Distribution Facilities shall be subject to periodic inspection by the City.

(3) Any Person desiring to conduct Telecommunications Transmission and Distribution Facilities Work in, along, across, under, or over Public Rights-of-Way must first apply for and obtain a Telecommunications Transmission and Distribution Facilities Work Permit, in addition to any other building permit, license, easement, Franchise, or authorization required by law.

(4) All applications for Telecommunications Transmission and Distribution Facilities Work Permits shall be submitted to the City Engineer. The City Engineer shall design and make available forms for such applications, requiring such information as the City Engineer determines in his or her discretion to be necessary, consistent with the provisions of this Chapter, to accomplish the purposes of this Chapter. Each such application shall be accompanied by payment of an user fee in the amount of $25.00 ("Base Fee") plus $10.00 per 300 feet of right-of-way involved and an additional $10.00 per road crossing to cover the cost of processing the application ("Variable Fee").

(5) In order to reduce the number of interruptions of the Public Rights of Way in the future, in the course of any Telecommunications Transmission and Distribution Facilities Work involving the installation of Telecommunications Transmission and Distribution Facilities, whether pursuant to new construction, relocation, repair, replacement, substitution, upgrading or otherwise, the Franchisee shall install and dedicate to the City either a state of the art telecommunications compatible conduit at least one and one fourth inches in diameter or at least four optic fibers, at the City's option, along the entire length of the Telecommunications Transmission and Distribution Facilities installed by the Franchisee under the Permit. The conduit or fibers so installed and dedicated may be used by the City for whatever purposes it may deem appropriate, including rental to the Franchisee or other applicants or Franchisee for use of the Public Rights-of-Way. The Franchisee may deduct the actual documented incremental costs of the installation of the additional conduit or fibers first from the Variable Fee and then from Franchisee Fees owed to the City, so long as such costs are not passed through to ratepayers. The Franchisee shall provide the City with the computation of said costs with any payment of Fees which includes an off-set therefor. The Franchisee shall provide the City with the precise location of said dedicated conduit or fibers so that it may utilize it in the future. The Franchisee shall permit access thereto upon request by the City.

(6) The City Engineer shall review each application for a Telecommunications Transmission and Distribution Facilities Work Permit and, upon determining that the applicant has all requisite authority to perform the desired Telecommunications Transmission and Distribution Facilities Work and that the applicant has submitted all necessary information and has paid the user fee, shall issue the Telecommunications Transmission and Distribution Work Permit, except as provided in subsection (7) hereof. In order to avoid excessive processing and accounting costs to either the City or the Franchisee, the City Engineer shall have authority to establish procedures for bulk processing of applications and periodic payment of fees in situations involving Franchisees that have numerous applications.

# EXHIBIT B

# ORDINANCE 960656

**Enacting a new chapter 25, Code of Ordinances, entitled "Communications Transmission Systems" to establish the conditions under which persons may operate wired communications systems and open video systems using public rights of way and other public property.**

BE IT ORDAINED BY THE COUNCIL OF KANSAS CITY:

Section 1. There is enacted a new chapter 25, Code of Ordinances, entitled "Communications Transmission Systems" to read as follows:

## CHAPTER 25 COMMUNICATIONS TRANSMISSION SYSTEMS

### ARTICLE I. GENERAL PROVISIONS

**Sec. 25-65. Coordination of construction activities.**

For the protection of the public's safety and investment in its streets and other public rights of way, all persons occupying the public rights of way shall cooperate with the City and each other in planning, constructing and maintaining a system. By January 1 of each year, every occupant of the public rights of way shall provide the City with a schedule of their proposed construction activities that may affect the public rights of way for that year. Each occupant of the public rights of way shall meet with the City at least annually, or more often if required by the City, for the protection of the public's safety and investment in its streets and other public rights of way in an attempt to coordinate construction in the public rights of way. Such meeting may include some or all other occupants of the right of way or other public property. Construction shall be scheduled and coordinated to minimize public inconvenience, disruption and damage to the public rights of way.

**Secs. 25-66--25-70. Reserved**

## DIVISION 3. ACCESS BY THE CITY

**Sec. 25-71. Access to system by the City.**

As part of the total compensation paid to the City for the right of an operator to occupy public property and conduct its business, the City shall require as part of a franchise or license agreement access to the system for transmission of video, audio, data or other signals. It is understood that an operator's system may include discontinuous links, and that the City may postpone access. The City may interconnect other systems, including its own, using appropriate technology that will not impair the operators' systems.

**Sec. 25-72. Scope of access to the operator's or infrastructure provider's system.**

Except for space available on the operator's system, an operator or infrastructure provider, unless otherwise required by a separate franchise or license agreement, shall not be required to supply the equipment necessary for the system to be utilized by the City. If access is required, the operator will provide to the City access to the system which shall be of the highest technical quality provided by the operator or infrastructure provider to other users, including the operator.

**Sec. 25-73. Indemnification.**

(a) *City obligation.* The City shall indemnify, defend and forever hold harmless an operator, its officers, employees, agents, licensees and affiliates from and against any and all claims, judgments, costs, liabilities, damages, and expenses (including reasonable attorney's fees) arising out of or in connection with the use of the facilities provided to the City by an operator.

(b) *Operator's negligence or willful misconduct.* Notwithstanding anything to the contrary contained in this section, an operator shall not be so indemnified or reimbursed in relation to any

# EXHIBIT C

# PRELIMINARY DRAFT

# CITY OF KIRKSVILLE
# PUBLIC RIGHT-OF-WAY MANAGEMENT ORDINANCE

**AN ORDINANCE OF THE CITY OF KIRKSVILLE, MISSOURI, GRANTING AND REGULATING THE USE OF PUBLIC RIGHT-OF-WAY FOR THE PURPOSE OF CONSTRUCTING, MAINTAINING, AND OPERATING INFRASTRUCTURE SYSTEMS IN, UNDER AND ACROSS CERTAIN STREETS AND PUBLIC RIGHT-OF-WAY IN THE CITY OF KIRKSVILLE, MISSOURI.**

**WHEREAS,** utility providers, telecommunication providers and others (hereinafter public right-of-way "Users") desire use of certain public right-of way within the City of Kirksville (hereinafter referred to as the "City") for the purpose of conducting business and constructing, maintaining and operating infrastructure systems and other uses pursuant to the provisions of the laws of the State of Missouri; and

**WHEREAS,** the use of the City's streets and public right-of -way should be conducted and managed in a manner that is consistent with sound real estate management principles, the maintenance of public safety, proper traffic control and responsible stewardship of municipally-owned infrastructure; and

**WHEREAS,** it is in the public's interest to set forth the rights and obligations of Providers using public right-of way in order to promote public safety and provide for compensation to the city for its expenditures made to manage and maintain public right-of-way resources for use by utility providers and others;

**NOW THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF KIRKSVILLE, MISSOURI:**

**SECTION 1: INTRODUCTION**

This ordinance shall be known as and may be cited as the "City of Kirksville Public Right-of-Way Management Ordinance". In addition to the provisions set forth herein, public right-of-way

(f) In the event that the permittee fails to backfill, repair or repave any cuts or excavations made in city streets the city shall, at its option, repair said cut with city forces or contract the repair to be made, and charge the permittee for the full contract cost of repair. If the City makes the repair with City forces the charges shall be based on the unit price paid on the most recent Street Improvement or Pavement Repair Contract issued by the City Engineer.

## SECTION 7: WORK BY OTHERS, CONSTRUCTION BY ABUTTING OWNERS, ALTERATIONS TO CONFORM WITH PUBLIC IMPROVEMENTS

(a) The City reserves the right to lay, and permit to be laid, sewer, gas, water and other pipe lines or cables and conduits, as well as drainage pipes and channels and streets and to do and permit to be done, any underground and overhead installation or improvement that may be deemed necessary or proper in, across, over or under any street, alley, highway, public place occupied by user, and to change any curb or sidewalk or the grade of any street and to maintain all City of Kirksville facilities. In permitting such work to be done, the City shall not be liable to user for the costs of utility relocation or for any other damage, nor shall the City be liable to user for any damages arising out of the performance by the City or its contractors or subcontractors, not willfully and unnecessarily occasioned. However, nothing herein shall relieve any other person or corporation from liability for damage to facilities or system of user. The City shall not be liable for any damage to user's property or for any direct or consequential damage to user or its customers that may arise if the City, its agents, employees or contractors negligently cause the flow of data or light impulses through said lines to be interrupted or stopped, provided that nothing herein shall relieve any third party responsibility for damages caused to user by such third party.

(b) Whenever, by reason of changes in the grade or widening of a street or in the location or manner of constructing a water pipe, gas pipe, drainage channel, sewer, or other city-owned underground or above ground structure it is deemed necessary by the City to move, alter, change, adapt, or conform the underground or above ground facilities of user, user shall make the alterations or changes, on alternative right-of-way provided by the City, if available, as soon as practicable after being so ordered in writing by the City without claim for reimbursement or damages against the City.

(c) If the City requires user to adapt or conform its facilities, or in any way or manner to alter, relocate or change its property to enable any other corporation or person except the City, to use, or to use with greater convenience, any right-of-way, street, alley, highway or public place, user shall not be required to make any such changes until such other corporation or person shall have undertaken, with solvent bond, to reimburse user

# EXHIBIT D

COUNCIL BILL NO. 97-060 ORDINANCE NO.

AN ORDINANCE amending the Joplin City Code by enacting Appendix 29-C, Telecommunications Regulations, enacting uniform regulations for the Telecommunications Industry.

BE IT ORDAINED BY THE COUNCIL OF THE CITY OF JOPLIN, MISSOURI, AS FOLLOWS:

That the Joplin City Code be amended by enacting Appendix 29-C, Telecommunications Regulations, to read as follows:

APPENDIX 29-C, TELECOMMUNICATIONS REGULATIONS

SECTION 1. - INTENT AND SCOPE OF ORDINANCE

A. Intent.

1. The procedures set forth by this Ordinance for granting Permits and Licenses for the construction and operation of Telecommunication Systems or Open Video Systems in the City promote the public interest, advance the health, welfare and safety of the public and stimulate commerce by ensuring that Telecommunications Systems and Open Video Systems are responsive to the needs and interests of the City and its residents and there is an orderly process for the granting or renewing of Permits and Licenses and overseeing the development and provision of services provided pursuant to Permits and Licenses.

2. This Ordinance is adopted pursuant to the City's power to provide for the public health, safety, welfare, peace and convenience and pursuant to its power to manage the Rights-of-Way and receive reasonable, nondiscriminatory compensation for the use of Rights-of-Way by telecommunications providers, as expressly set forth by Sections 253 and 653 of the Telecommunications Act of 1996 ("Act") [P.L. No. 104-104].

Consistent with the Act, the City's regulation of the use of Rights-of-Way will not have the effect of prohibiting the provision of telecommunication services.

B. Scope of Ordinance. This Ordinance shall provide the basic local regulatory scheme for providers of telecommunications services, including providers of only the physical plant necessary to operate a communications system, unless otherwise expressly excluded. This Ordinance shall

SECTION 14. - OVERSIGHT AND REGULATION

A. The City shall have the right to oversee, regulate and inspect periodically the construction, maintenance, operation and upgrade of the System, and any part thereof. Permittee or Licensee shall establish and maintain managerial and operational records, standards, procedures and controls to enable Permittee or Licensee to prove, in reasonable detail, to the satisfaction of the City at all times throughout the term of the Permit or License, that Permittee or Licensee is in compliance with the Permit or License. Permittee or Licensee shall retain such records for not less than ten (10) years following their creation, and for such additional period as the City may direct.

B. A Permittee or Licensee shall at all times maintain on file with the City, a full and complete set of plans, records and "of record" maps of all existing and proposed installations and the types of equipment and facilities installed or constructed, properly identified and described as to the types of equipment and facility by appropriate symbols and notes which shall include annotations of all Rights-of-Ways where work will be undertaken. Maps shall be drawn to scale.

C. Upon forty-eight (48) hours' written notice, and during normal business hours, a Permittee or Licensee shall permit examination by any duly authorized representative of the City, of all Permit or License Property, together with any appurtenant property and facilities of a Permittee or Licensee situated within or without the City, and all records relating to the Permit or License, provided they are necessary to enable the City to carry out its regulatory responsibilities under federal, state and local law, or a Permit or License. Such records include: all books, records, maps, plans, financial statements, service complaint logs, performance test results, records of request for service, and other like materials of Permit or Licensee. A Permittee or Licensee shall have the right to be present at any such examination.

D. If any of the records described in the previous subsection are proprietary in nature or must be kept confidential by federal, state or local law, upon proper request by a Permittee or Licensee such information obtained during such an inspection shall be treated as confidential, making it available only to those Persons who must have access to perform their duties on behalf of the City, including but not limited to the Division of Finance, and the Law Department.

E. Copies of all petitions, applications, communications and reports submitted by a Permittee or Licensee on behalf of, or relating to a Permittee or Licensee, to the Federal Communications Commission, Securities and Exchange Commission, or any other federal or state regulatory commission or agency having jurisdiction with respect to any matters affecting a Permitted or Licensed Telecommunications System or Open Video System shall be made available to the City upon request. Copies of responses from such regulatory agencies to a Permittee or Licensee shall likewise be furnished to the City upon request.

# EXHIBIT E

ORDINANCE NO. _____

**THE CITY COUNCIL OF THE CITY OF SPRINGFIELD DOES ORDAIN AS FOLLOWS:**

The following Ordinance is added to the City of Springfield Code:

## ORDINANCE _____ TELECOMMUNICATIONS ORDINANCE

### SECTION 1 -- DECLARATION OF FINDINGS AND INTENT; SCOPE OF ORDINANCE

1.1 Declaration of Finding and Intent.

1.1.1 The City of Springfield ("Springfield") finds that the public streets, alleys, easements and other Rights-of-Way within Springfield:

(a) are critical to the travel and transport of persons and property in the business and social life of Springfield;

(b) are intended for public uses and must be managed and controlled consistent with that intent;

(c) can be partially occupied by the facilities of utilities and other public service entities delivering utility and public services rendered for profit, to the enhancement of the health, welfare, and general economic well-being of Springfield and its citizens; and

(d) are a unique and physically limited resource requiring proper management to maximize the efficiency and to minimize the costs to the taxpayers of the foregoing uses and to minimize the inconvenience to and negative effects upon the public from such facilities' construction, placement, relocation, and maintenance in the Rights-of-Way;

(e) are an asset of the City of Springfield that taxpayers spent in the past fiscal year alone $2.4 Million Dollars to acquire, and in excess of $10 Million Dollars to improve.

1.1.2 Springfield finds that the right to occupy portions of the Rights-of-Way for limited times for the business of providing telecommunications services or open video services is a valuable economic right to use a unique public resource that has been acquired and is maintained at great expense to Springfield and its taxpayers, and the economic benefit of such rights should be shared with all the taxpayers of Springfield.

of all Rights-of-Ways where work will be undertaken. Maps shall be drawn to scale. The electronic format to be submitted shall be to State plane coordinates using 1983 datum in one of the following formats: (1) arch/info export file; (2) arch/info coverage file; (3) AutoCAD drawing file; or (4) a dxf. file. The Director of Public Works may specify a different electronic format as needed for the Department of Public Works to evaluate and maintain an adequate data base of infrastructure information in his sole discretion.

(b) If requested by Springfield, a summary of service calls, identifying the number, general nature and disposition of such calls, on a monthly basis. A summary of such service calls shall be submitted to Springfield within thirty (30) days following its request in a form reasonably acceptable to Springfield.

(c) Throughout the Term, an Operator, Licensee or Franchisee shall maintain complete and accurate books of account and records of the business, ownership, and operations of an Operator, Licensee or Franchisee with respect to the System in a manner that allows Springfield at all times to determine whether an Operator, Licensee or Franchisee is in compliance with the Franchise or License. Should Springfield reasonably determine that the records are not being maintained in such a manner, an Operator, Licensee or Franchisee shall alter the manner in which the books and/or records are maintained so that an Operator, Licensee or Franchisee comes into compliance with this Section. All financial books and records which are maintained in accordance with the regulations of the FCC and any governmental entity that regulates utilities in the State of Missouri, and generally accepted accounting principles shall be deemed to be acceptable under this Section. An Operator, Licensee or Franchisee shall also maintain and provide such additional books and records as Springfield deems reasonably necessary to ensure proper accounting of all payments due Springfield.

8.4 Reports.

8.4.1 Status Reports. An Operator, Licensee or Franchisee shall submit to Springfield reports describing, in detail, the status of the construction of the Initial System every six (6) months until its substantial completion. An Operator, Licensee or Franchisee shall, upon substantial completion of the Initial System, notify Springfield in writing. If the scope of the Initial System is expanded, an Operator, Licensee or Franchisee shall likewise report every 6 (six) months on the state of continuation of expansion.

8.4.2 Financial Reports. An Operator, Licensee or Franchisee shall submit to Springfield not later than three (3) months after the end of each annual fiscal period, a copy of an Operator's annual financial statements for such period which statements shall be signed by the Chief Financial Officer of an Operator, Licensee or Franchisee provided, however, that Springfield may also require such statements to be audited and certified by an independent certified public accountant in accordance with generally accepted accounting principles. Such statements shall be accurate and complete.

8.4.3 Additional Information and Reports. An Operator, Licensee or Franchisee shall provide annually to the department designated by Springfield a list of any and all material communications, public reports, petitions or other filings, either received from or submitted to any municipal, county, state or federal agency or official (and any response thereto submitted by or received by an Operator, Licensee or Franchisee), which in any way materially affects the operation of the System or any Service or an Operator, Licensee or Franchisee's representations and warranties set forth herein, but not including tax returns or other filings which are confidential. Upon the request of Springfield, an Operator, Licensee or Franchisee shall promptly, but in no case later than ten (10) business days following the request, deliver to Springfield a complete copy of any item on said list. Upon the request of Springfield, an Operator, Licensee or Franchisee shall promptly submit to Springfield any information or report reasonably related to an Operator, Licensee or Franchisee's obligations under the Franchise, its business and operations, or those of any Affiliated Person, with respect to the System or its operation, or any Service distributed over the System, in such form and containing such information as Springfield shall specify. Such information or report shall be accurate and complete.

8.5 Confidentiality. If the information required to be submitted in an Annual Report is proprietary in nature or must be kept confidential by federal, state or local law, upon proper request by an Operator, Licensee or Franchisee such information shall be treated as confidential, making it available only to those Persons who must have access to perform their duties on behalf of Springfield, including but not limited to the Department of Finance, the Office of the City Attorney and the Mayor and Council Members, provided that an Operator, Licensee or Franchisee notifies Springfield of, and clearly labels the information which an Operator, Licensee or Franchisee deems to be confidential, proprietary information. Such notification and labeling shall be the sole responsibility of Franchisee. To the extent the Government Records Management Access Act ("GRMAA") or any other federal requirement for privacy applies to the information to be submitted, such law shall control.

8.6 Operator, Licensee or Franchisee's Expense. All reports and records required under this Ordinance shall be furnished at the sole expense of an Operator, Licensee, Franchisee, except as otherwise provided in this Ordinance or a Franchise.

8.7 Right of Inspection. Springfield's designated representatives shall have the right to inspect, examine or audit during normal business hours and upon reasonable notice to an Operator, Licensee or Franchisee under the circumstances, all documents, records or other information which pertain to an Operator, Licensee or Franchisee or any Affiliated Person with respect to the System, its operation, its employment and purchasing practices, Services distributed over the System, and with respect to an Operator, Licensee or Franchisee's obligations pursuant to the Franchise. All such documents shall be made available within Springfield or in such other place that Springfield may agree upon in writing in order to facilitate said inspection, examination, or audit, provided, however, that if such documents are located outside of Springfield, then an

# EXHIBIT F

# CU restraining trade, firm alleges

## A St. Louis company says the utility is delaying its request to string a fiber network.

By Deborah Barnes
News-Leader

A St. Louis company, hoping to compete with Southwestern Bell for local telephone customers, says City Utilities is stalling its efforts to enter the Springfield market.

Brooks Fiber Properties wants to build a 16-mile, center-city fiber network to provide local telephone services.

But so far, it has been unable to reach an agreement with City Utilities to string the fiber from utility poles.

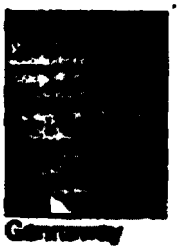
That prompted Brooks Fiber Vice President John Shapleigh to write a letter to CU General Manager Robert Roundtree on Dec. 19 accusing the utility of unfairly restraining trade. The letter also posed what Roundtree described as "a veiled threat of legal action."

Shapleigh's letter notes that CU plans to lease excess capacity on its own 135-mile fiber optics network to telecommunications providers — a move approved by the City Council last month to promote competition in a monopoly-dominated industry.

That puts CU in the position of being both a regulator and a competitor. And that concerns Shapleigh as he tries to gain access to the utility's poles.

Shapleigh's letter said CU attorney Andy Dalton and Assistant General Manager Gerald Lee have asked whether Brooks will lease any of the utility's fiber capacity. Such discussions are "wholly inappropriate" as long as CU delays his company's request for space on the poles, he said.

A Dec. 20 response from Roundtree said questions posed by CU workers about whether Brooks will lease capacity on CU's fiber network stemmed from initial inquiries from Brooks officials and are not connected to the talks about pole attachments.


Gannaway


Hacker

CU and Brooks still have many issues to work out, but "there is no interest in denying them a pole attachment," Roundtree said.

"City Utilities is willing to negotiate in good faith to offer a pole attachment agreement to Brooks," Roundtree wrote to Shapleigh.

But City Utility must determine whether there is sufficient capacity on the 562 poles Brooks wants to hook on to, Roundtree's letter said, and that the attachments won't pose a risk to the safety or reliability of others already connected.

Mayor Lee Gannaway and Councilwoman Teri Hacker, both of whom opposed CU's entrance into the telecommunications industry, said they were concerned about Shapleigh's letter. But both said they don't

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## Fiber / Safety, line placement among issues

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know what, if anything, they can do about it now.

"I stand by my previous comments on this issue but as a council we've approved it," Hacker said.

CU Board Member Dan Chiles, the leading proponent of utility involvement to ensure fair access to all Springfieldians to the new "information superhighway," said the utility is acting reasonably and is not trying to stonewall Brooks or force it to buy any of CU's excess fiber capacity.

"The only reason to my knowledge (for the delay) is that there are some serious health and safety reasons about putting these guys on the poles when some of the poles can't support them," Chiles said.

Some of the more than 500 poles Brooks want access to don't have space for the company's lines and would have to be taken out and replaced with taller poles, Chiles said.

Placement of the lines is another issue. Chiles said Brooks wants the dominant top position on each pole, but Roundtree said as the newest competitor, their lines will be placed at the bottom.

Brooks official Mark Ritter declined to discuss the letter or the company's concerns.

He said Brooks didn't want to air its differences publicly and still hoped to work out an agreement with CU.

Negotiations are continuing.